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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No.

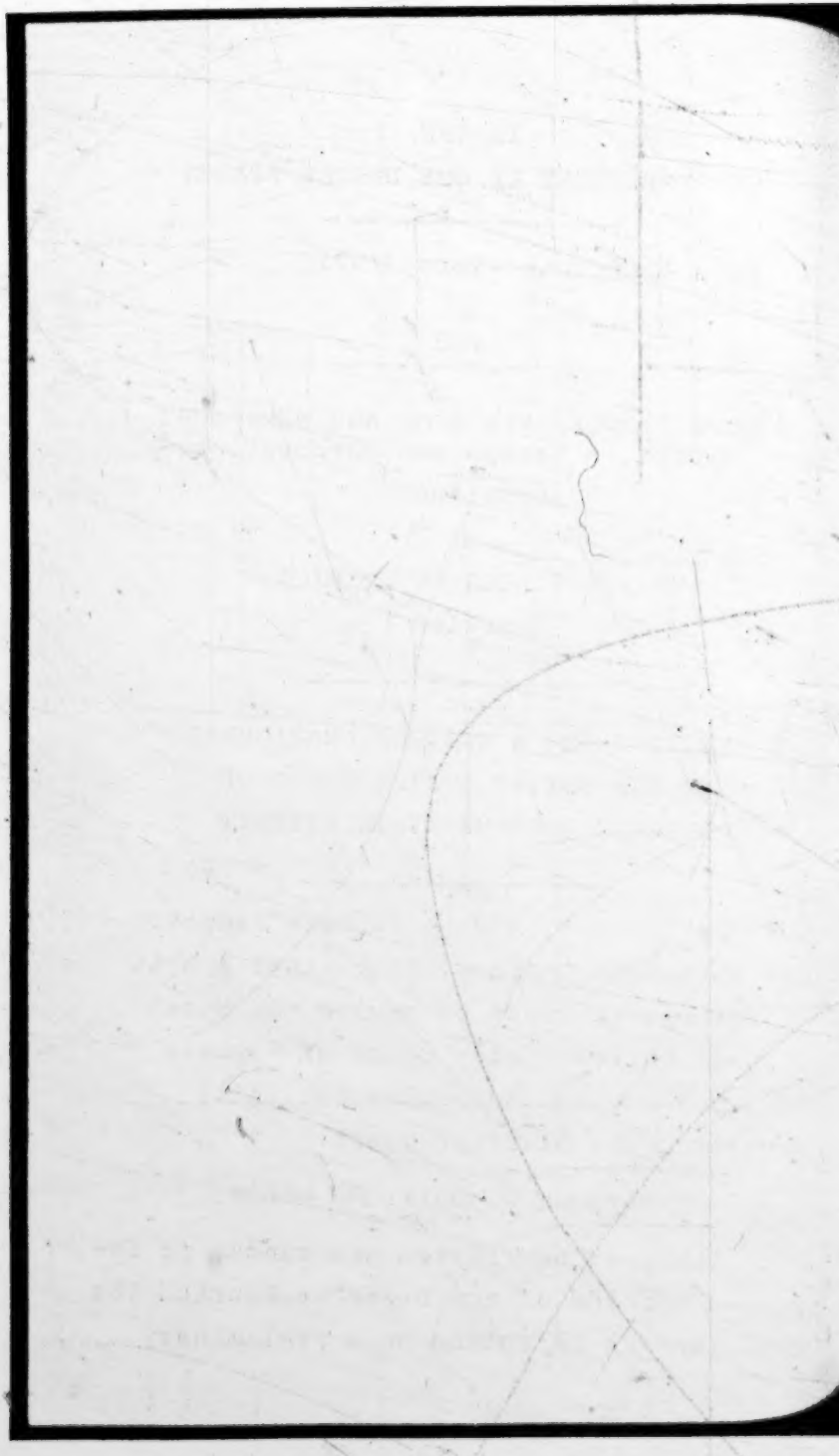
ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Almota Farmers Elevator and Warehouse Company, prays that a Writ of Certiorari issue to review the Ninth Circuit United States Court of Appeals judgment entered September 23, 1971, reversing the District Court.

CITATIONS TO OPINIONS BELOW

There is no written memorandum or reported opinion of the District Court. Its oral remarks in ruling on a preliminary



motion to determine the law of the case appear in Appendix A, page 47 with the oral statements made in rendering judgment appearing at page 51 of Appendix A. The Circuit Court opinion is reported in 450 F.2d 125 (Appendix A, p. 32).

JURISDICTION

The Circuit Court judgment was made and entered September 23, 1971, and its order denying a rehearing was entered on December 9, 1971, (Appendix A, p.46). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and that of the District Court under Title 28 U.S. Code 1358.

QUESTION PRESENTED

In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, may an element of great inherent value in the improvements be excluded merely because it does not, by itself, rise to the status of a legal property right.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution is involved, which states: "nor shall private property be taken for public use, without just compensation."

STATEMENT

On May 26, 1967, the United States filed an action and a declaration of taking in the United States District Court for the Eastern District of Washington, Northern Division, to condemn the leasehold of the Almota Farmers Elevator and Warehouse Company, in 0.75 acre of land owned in fee by the Oregon-Washington Railroad and Navigation Company and situated in a relatively remote area at Almota in Whitman County on the Snake River in Eastern Washington in connection with the Little Goose Lock and Dam project.

The Almota Company had been a tenant of the property under various railroad leases since 1919. The one taken being a 20 year lease expiring October 12, 1974. The land as leased was totally unimproved and of no great value, the rent being $114.20 per year. The tenant erected building im-

provements and installed machinery and equipment all of which was owned by the Almota Company with a right of removal. The improvements taken included three crib grain elevator buildings and a concrete tank of a total grain storage capacity of 522,500 bushels plus a grain warehouse of 63,900 bushels capacity.

No factual dispute exists. The sole issue is one of law as to what inherent elements of value must be considered in arriving at the amount of just compensation under the Fifth Amendment. The value of the leasehold, exclusive of the improvements, etc., was urged by the Government to be the use value of the unimproved premises to the end of the term less the agreed rent of $114.20 per year. That was conceded and is not in issue. But the Government further contended that the same rule should be applied to the valuation of the tenant owned improvements and fixtures plus only their salvage value remaining at the end of the term of the lease, in spite of the admitted facts of the right of removal and that, as between the landlord and the tenant, they were the personal property of the Almota

Company (1), which ownership was in effect a "fee" that would not end with the lease.

The Government further argued that no consideration whatsoever should be given in the valuation of Almota's improvements to any element of value arising from the possibility or probability of a renewal of the lease, enabling their use to continue in place, or to the enhanced value of the premises as a whole arising from the tenant owned leasehold improvements. It thereby sought to acquire the lessee's improvements, etc., (held as personal property but for purposes of condemnation being a part of the real estate) at far less than their actual fair market value (2) although Almota owned

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(1) By the law of the State of Washington (Chung v. Fong Co., 130 Wash. 154) tenant owned building improvements are the personal property of the tenant as between landlord and tenant though for purposes of what the Government must condemn they are part of the real estate. (United States v. Seagren, 50 F.2d 333)

(2) The Government agreed by stipulation that the leasehold and tenant owned improvements, etc., considering all elements of value would in fact sell upon the market at the time of taking for $274,625 whereas under the valuation theory of the Government the value would be limited to $130,000 by excluding all consideration of the probable use of the improvements in place. (Appendix B p. 58 & 59)

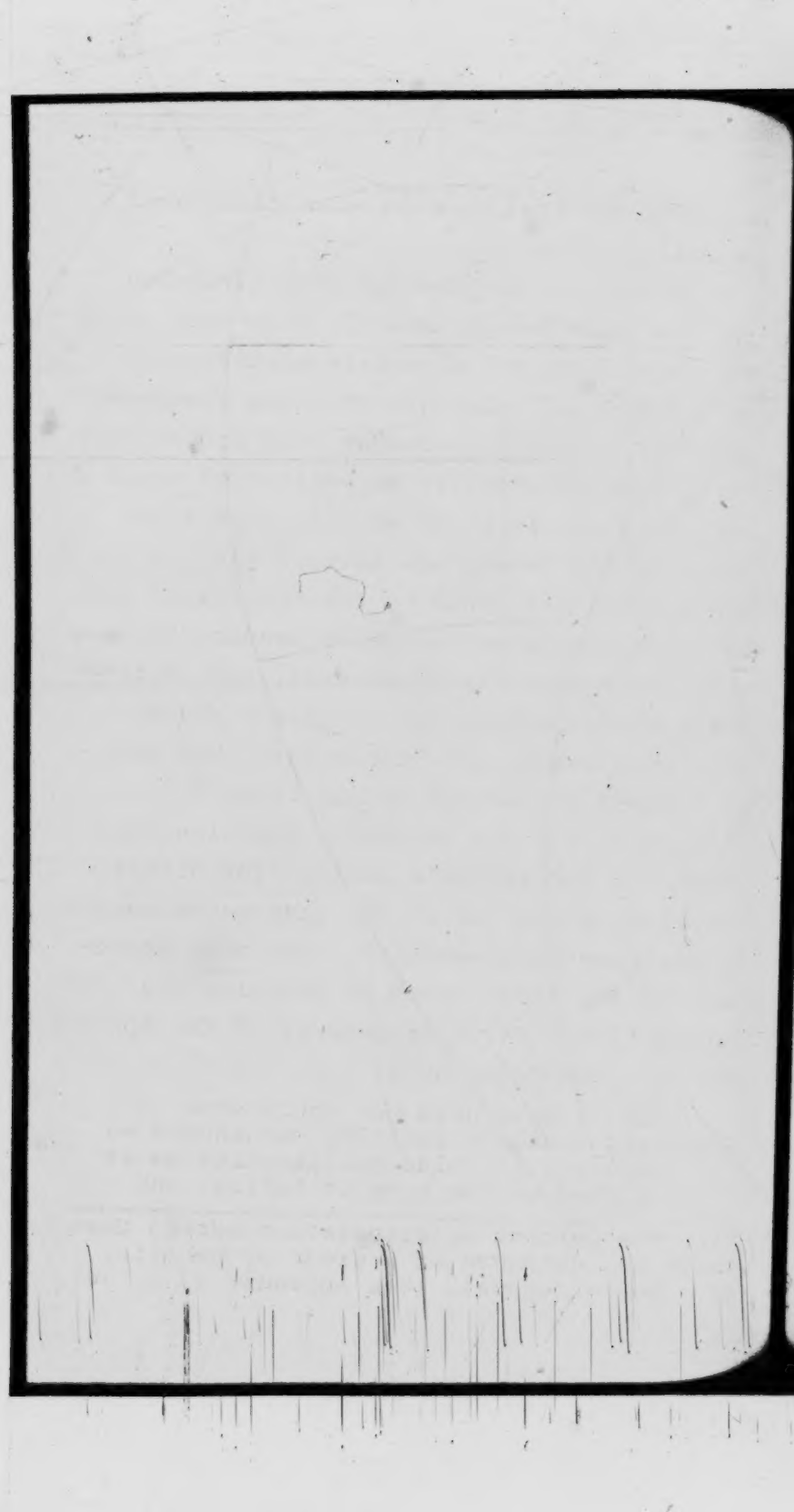
a fee in the improvements when considered as real estate.

Almota argued that it should receive for its improvements exactly what they could have been sold for in a fair market sale considering all elements of value whatsoever inhering in them, including such probability or lack of probability as existed of their continued use in place arising from a renewal of the lease, and further that, since the fee was not owned by the Government and as there was agreed evidence tending to show a great probability of renewal, the improvements should not be valued on the assumption that it was inevitable that they must be removed at the end of the term.(1)

Initially the valuation question was raised by the lessee's motion "for determination of the law of the case on valuation of building improvements". The oral statement of the Trial Court in granting the motion is set forth at page 47 of the Appendix. The Court held:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and

(1) The parties by stipulation agreed that there was evidence of a great probability of a lease renewal. (See Appendix B, p. 56).



the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

Thereafter the Trial Court adhered to its position and on April 1, 1969, entered judgment in favor of the Almota Company for $274,625. The oral remarks of the Court in granting judgment are set forth at page 51 of Appendix A.

The fee owner of the premises was never a party to the action. It was urged by Almota, concurred in by the Trial Court, and admitted by counsel for the Government in a Trial Court argument[1] that under the

(1) In argument upon the preliminary motion the following remarks were made between Government counsel and the Court:
Mr. McRae: "....So, your honor, I don't think it defies legal principles to say that it follows that what they are entitled to is the value of their lease, the value of their tenancy, as enhanced by the buildings which they put on the property, which are real property, and here they have the right to remove the buildings, so they are entitled to whatever removal value they had.
The Court: Mr. McRae, on your theory of

unit rule of valuation with the fee owner joined as a defendant the award for the improvements would have necessarily been very substantially greater than the $130,000 valuation contended for by the Government (1).

No testimony was taken. Judgment was entered on April 1, 1969, based upon a stipulation of the parties and the agreed facts in the pre-trial order that the fair market value of the interests of Almota in the land and improvements valued as contended

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the case, on the day before the condemnation action was filed, if the Almota Company had conveyed this property to the railroad company, you would be paying them about five times as much as you are offering them now -- you would be paying the railroad company about five times as much as you are offering them now.
Mr. McRae: On the day before?
The Court: If, on the day before, the landlord and the tenant's interests were merged, before you acquired -- or suppose you acquired -- suppose the railroad company conveyed this [0.75] acres to the Almota Company on the day before the condemnation action, they would have owned this fee and the buildings and the lease, and you would then be paying substantially a greater amount of money, wouldn't you?
Mr. McRae: Yes, your Honor."

(1) In that connection Almota contended and the Trial Court concluded that the amount of just compensation awarded should not be reduced merely because the fee owner was not a party to the action.

for by Almota was the sum of $274,625. It was also stipulated that the value based on the tenant's "bare legal rights", as contended by the Government, was the sum of $130,000. The term "bare legal rights" was used to refer to the contention of the Government that, as Almota had no legal right to a renewal of the lease, no enhanced market value of the improvements arising from any probability of a renewal could be considered.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court entered its decision on September 23, 1971, reversing the Trial Court and determining just compensation to be the sum of $130,000 pursuant to the method of valuation contended for by the Government. (Appendix A, p. 32)

The opinion erroneously concludes that the judgment of the Trial Court included compensation for a renewal expectancy of the lease as a compensable property right whereas it was only considered as an element of value inhering in and adding to the market value of the property taken. In its opinion the Circuit Court concedes that the case of Borough of Manhatten, 388 F.2d 596, relied upon by the Trial Court, does support

the position of Almota but it declined to follow that decision in the Ninth Circuit and proceeded to adopt a rule directly in conflict with it.

A petition for rehearing was timely filed in which it was urged that the possibility or probability of a renewal of the lease was an element of value inhering in the tenant owned improvements entitled to consideration the same as are such matters as schools, roads, markets, view, etc., as held by both the Ninth and Tenth Circuits in United States v. Fuller, 2 F.2d 504, and United States v. Jaramillo, 190 F.2d 300, all of which are generally elements of value considered without there being any legal right to their continued existence. The petition was denied on December 9, 1971.

REASONS FOR GRANTING THE WRIT

1. Direct Conflict With Second Circuit

The decision of which review is sought is in conflict with the well established rule of the Second Circuit Court of Appeals as set forth in United States v. 1,132.5 acres of land etc., Upper Allegheny Sand & Gravel Co., 441 F.2d 356, which states at page 358:

"It is well settled in this circuit

that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their continued use in place impossible. See United States vs. Certain Property, etc. (Il Progresso), 306 F.2d 439, 448 (2d Cir. 1962). See also United States v. Certain Property, etc. (Lafayette Nut Product), 344 F.2d 142, 146 (2d Cir. 1965); United States v. Certain Property, etc. (193 Realty Corp.), 388 F.2d 596, 600 (2d Cir. 1968) (en banc). Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.' Jackson v. State, 213 N.Y. 34, 35, 106 N.E. 758 (1914) (Cardozo, J.)."

The Court below was advised of that rule but it definitely declined to apply it in the Ninth Circuit and proceeded to limit the compensable value of the tenant owned building improvements and fixtures taken to the value of their use for the remainder of the lease plus their salvage value at the end of the term. In so doing, the Court discussed and expressly declined to follow the Second Circuit rule as expressed in the Manhattan Case, (United States v. Certain Property,

388 F.2d 596). The Circuit Court below admits that the rule of the Manhattan case supports the position of Almota and states:

"The District Court in our instant case relied heavily upon the important decision of the Court of Appeals for the Second Circuit, United States v. Certain Property, Borough of Manhattan, 388 F.2d 596 (1968). The opinion in that case does support the contentions of Almota in the instant case. It awards compensation for expectations disappointed by the exercise of the sovereign power of eminent domain, expectations not based upon any legally protected right, but based only, to borrow the language of Justice Holmes in Emery, supra, upon 'a speculation on a chance'. In the Borough of Manhattan case, supra, the Court says '* * an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords * *'. Almota urges that the alchemy performed by the Court in Borough of Manhattan, the conversion of items, which would have weight in the thinking of a speculator, into Fifth Amendment 'property' and thence into dollars, is an introduction of modern realism into the law, to displace dry and tired conceptualism.

We are not persuaded by the Borough of Manhattan, supra, opinion."

Thus there is here a direct conflict on an important constitutional question as to whether just compensation for tenant owned building improvements and fixtures is, as to

their value at the end of the term, to be limited to their salvage value as held by the Ninth Circuit Court below or is to be valued for use in place as held in the Second Circuit. That conflict presently exists and is of recent origin, the Allegheny decision being April 14, 1971, and that of the Court below being September 23, 1971.

There is no reconciliation between the two positions. Both cannot be the law. The United States Constitution is the supreme law of the land. What is just compensation in the one circuit must also be just compensation in the other. Only the United States Supreme Court can now resolve that conflict by granting a review.

2. Apparent Conflicts With Supreme Court

In the valuation of property taken in eminent domain proceedings all elements of value inhering in the property are to be considered. (Olson v. United States, 292 U.S. 246).

In restricting the compensable value (at the end of the term) of the improvements owned by the tenant to their then salvage value and refusing to consider any added market value arising from the possibility or probability of their continued use in place

resulting from a lease renewal, the Court below denied to Almota consideration of one of the elements of value inhering in its legal property rights.

The parties stipulated that the fair market value of the tenant's legal property rights[1] in the leasehold and improvements, etc., was the sum of $274,625 "considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibility of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal." (Appendix B, pages 57 & 59). However, the Government contended that Almota is entitled to no such element of value. It was further stipulated that the fair market value of those same legal property rights possessed by Almota was the sum of $130,000, if no consideration is "given to any additional value which might have been obtained upon the open market based upon a supposition or ex-

(1) It was agreed that these rights consisted of a leasehold interest in the real estate being for a term ending October 12, 1974, and the ownership of the elevator buildings, machinery, and equipment situated thereon with a right of removal. (Appendix B, p. 55)

pectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable price." (Appendix B, p. 58,59). The only difference between the two methods of valuation is the inclusion or exclusion of an element of value arising from consideration of the possibility or probability of the tenant owned improvements, etc., continuing to be used in place upon the premises upon the expiration of the term of the lease.

The stipulation necessarily recognizes as a fact that the fair market value of the property is enhanced in the amount of $144,625 by the probability or possibility of that continued use. ($274,625 less $130,000). That very important element of value the Circuit Court below chose to ignore. All compensation therefor was denied upon the ground primarily that the expectancy of renewal is not a compensable property right. No property right is included in the $274,625 stipulated valuation which is not also included in the $130,000 valuation. It is only that the $274,625 valuation includes an element of inherent value excluded in the $130,000 valuation. Thus the decision is in conflict with the rule of the Supreme Court as stated in the Olson Case, supra, 292 U.S.

246) that all elements of value inhering in the property must be considered.

The decision below is also in conflict with the recognized rule of the United States Supreme Court that the owner of property taken must be, by the award of just compensation, placed in the same pecuniary position as if his property had not been taken. (Olson v. United States, 292 U.S. 246; and United States v. Miller, 317 U.S. 369) By the decision of the Court below it is held that $130,000 is just compensation for the very same property rights which by the agreed facts could have been sold in a fair market sale for $274,625. It is ridiculous to contend that the award of $130,000 for property which admittedly could have been sold for $274,625 will place Almota in the same pecuniary position as if its property had not been taken. If Almota's interests in the property could have been liquidated upon the market for $274,625 nothing less can be just compensation.

The ruling of the Circuit Court below is also in conflict with those Supreme Court cases holding that the measure of just compensation under the Constitution is fair market value. (United States v. Miller, 317 U.S. 369; U.S. v. Petty Motor Company, 327

U.S. 372). Here it is admitted by stipulation Almota's property interests had a fair market value of $274,625 if all elements having value upon the market are considered. To deny consideration of an element inhering in the property taken, having value upon the market, is to deny the recovery of the fair market value in violation of the rule of the above cited cases.

3. Apparent Conflicts With Other Circuits

The holding of the Court below that the value of the improvements, etc., at the end of the term of the lease must be restricted to their salvage value is directly in conflic with what clearly appears to have been the result reached by the Washington D.C. Circuit Court of Appeals in United States v. Seagren, 50 F.2d 333, where a very substantial award was made to a tenant for his leasehold improvements where his tenancy apparently was by sufferance only. Under the ruling of the Ninth Circuit Court below a tenant whose lease had already expired could only hope to receive the salvage or removal value of his tenant owned improvements because consideration of any probability of a renewal was denied.

In the Seagren case it is apparent that

far more than salvage value was awarded, as the improvements consisted of such items as buried tanks, concrete surfacing, pipes, etc. The evidence tended to show an original investment by the tenant of $60,000. A recovery of $35,000 was allowed without awaiting any settlement of the controversy as to whether or not the tenant was entitled to any right of tenancy beyond the date of the taking. Full value for the tenant's improvements appears to have been allowed rather than their salvage or removal value thus indicating a direct conflict with the Ninth Circuit Court below.

The decision below also appears to be in conflict with all cases of other circuit courts which apply and follow the unit rule stated in the District of Columbia Circuit Court case of Carlock v. United States, 53 F.2d 926 as follows:

> "The proper rule governing condemnation proceedings in cases of this sort is state in.....104 A. 429,...where the court said: 'in proceedings instituted and to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belonged to one person, and then apportion the sum between the holders of the different interests, according to their respective rights.'"

The Court below ignored the unit rule in restricting the value of the tenant owned improvements at the end of the lease term to their salvage value.

The decision below also appears in conflict with cases in the other circuit courts holding that all available uses affecting the market value of the property should be considered. The Court below has refused to consider the probable continued use of the elevator improvements in place upon the leasehold site. That probable use has been agreed by the parties to add $144,625 to the market value of the property condemned ($274,625 minus $130,000). Among other circuit cases allowing the consideration of all probable uses are United States v. 10,291.83 acres of land, etc., 411 F.2d 1081, 6th Circuit; and United States v. 25.406 Acres, Etc., 172 F.2d 990, (4th Cir.)

It appears to have weighed very heavily with the Court below that the probable lease renewal was not secured by a legal right. However, it need only be shown that the use is reasonably probable as stated in the 6th and 4th circuit cases last cited.

It was stipulated that there was evidence available tending to show a great

probability of the renewal of the Almota lease[1] resulting in the agreed market value being $274,625 with its consideration and $130,000 without. (Appendix B, p. 58, 59)[2] Yet, the Court below refused to consider the probability of renewal as an element of value of the improvements taken because it was speculative and it did not rise to the status of a legal property right. Surely, the consideration of the use of a tract of land as an apartment site would not fail merely because the owner presently did not have a building permit if it was reasonably probable one could be obtained.

The decision of the Court below is at variance with the holding in the Tenth

(1) It was agreed evidence was available to the effect that "Railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad." (Appendix B, p. 56)

(2) The latter valuation was said to be based on the "bare legal rights possessed by the lessee". That reference was used throughout the proceedings in the lower court as synonymous to the manner of valuation urged by the Government under which any element of value arising from the probability of a renewal of the lease was excluded.

Circuit of United States v. Jaramillo, 190 F.2d 300, where the availability and accessibility of Taylor Grazing Act permit lands was allowed to be considered as an element of value in fixing just compensation for other land being taken, even though there was no legal compensable property right in the permit lands nor any legal right to their continued use.(1)

Yet, the lower Court here refused to consider a probable lease renewal as an element of value of the improvements taken because there was no legal right to a renewal.

(1) That case states:

"In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. To this extent, this case is distinguishable on facts from the Cox and Beasley cases where the grazing permits were revoked coincidental with the taking of the fee.

Like schools, roads, markets, water and other appurtenant elements of value, it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken.* * "

4. Apparent Conflicts With Ninth Circuit Cases

In expressly holding that the expectancy or probability of the renewal of the lease is not an inherent element of value in the property rights taken because Almota had no legal right of renewal, the Court below overlooks its prior recent decision to the contrary in United States v. Fuller, 442 F.2d 504, citing with approval the Tenth Circuit Jaramillo case, supra. The opinion states:

> "The district court instructed the jury as follows: '* * *[R]eference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.'"
>
> * * * * *
>
> "(3) It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation."

As heretofore pointed out at page 18 the decision of the Court below is in conflict with the unit rule cases. Yet, it has adopted and followed the unit rule in other cases. (Burkhart v. U.S., 227 F.2d 659; United States v. Block, 160 F.2d 604; United States v. Adamant, 197 F.2d 1; and Nicholson v. Weaver, 194 F.2d 804).

A further apparent conflict of the Court below appears from its declining to consider any added value arising from a probability or expectancy of a renewal of the lease because of its conclusion that the matter was uncertain and speculative. Yet, where the market has valued a speculative element, the Court below has previously given it consideration. (Cal-Bay Corporation v. United States, 169 F.2d 15; and Phillips v. United States, 243 F.2d 1). It necessarily follows from the stipulation of the parties that the market did value the excluded element. (Appendix B, p. 58 & 59).

In order to resolve the hereinbefore mentioned conflicts in the Ninth Circuit decisions a suggestion was made in the petition for rehearing for an in banc hearing which was rejected. (Appendix A, p. 46)

5. An Important Undetermined Constitutional Question Of National Importance

The question for consideration upon the requested review involves the manner of determining the just compensation to be awarded for tenant owned building improvements and fixtures. That question is of great importance throughout the entire United States in every condemnation proceeding involving the taking of tenant owned leasehold improvements or fixtures. Eminent domain cases are a constant source of litigation. A large percentage of those involve leaseholds, a substantial number of which have the problem of valuing tenant owned improvements.

The decision below has restricted the award for improvements as of the end of the leasehold term to their salvage value. Should the date of taking coincide with the end of the term no compensation whatsoever would be awarded where the improvements have no salvage value as concrete paving, a drilled well, etc., even though they add great value to the property as a whole and their value cannot be recovered in the condemnation by the fee owner as he does not own them.

No decision heretofore rendered by the

Supreme Court appears to have determined or expressly discussed that question. If the decision below is allowed to stand without review it will be relied upon by the Government to negotiate unjust settlements with other tenant owners of improvements or fixtures or they will be compelled at great expense to litigate the question until such time as this Court decides the matter upon review. It is well known that most eminent domain cases are settled by negotiation without litigation. That would have occurred here but for the dispute as to the elements of value to be considered. It is thus of great importance that the decision below be reviewed now to lay the question at rest, settle the direct and inferential conflicts hereinbefore cited, and establish a rule of law to serve as a guide for all federal agencies and owners of tenant owned leasehold improvements in the future.

The valuation question involved is here squarely presented. It is a constitutional question which must be determined sometime. The Ninth and Second Circuits are now in direct conflict. The Washington, D.C. Circuit has reached

a result that appears to be in direct conflict. The decision below is inferentially contrary to numerous Supreme Court opinions, other circuit court cases, and other decisions of the Ninth Circuit itself. Failure to review the decision now will only result in future additional petitions for consideration. It is better that the question be decided and constitutional justice rendered now before more tenant owners of leasehold improvements are forced to suffer unconstitutional losses of their property.

Moreover, the question at issue can now be decided with a minimum expenditure of time. Should review be granted there is no other question of law or fact determination. The sole question at issue is one of constitutional law which ultimately can only be answered by the United States Supreme Court.

6. An Unconstitutional Confiscation Of Property

This reason is urged to emphasize that this petition is made in good faith for a meritorious cause to prevent the working of a partial unconstitutional confiscation of private property.

It is undisputed that the property the

Government took from Almota on May 26, 1967, was a leasehold interest terminating October 12, 1974, in 0.75 acres of unimproved land owned by the Oregon-Washington Railroad and Navigation Company, together with the tenant owned leasehold improvements and fixtures situated thereon. Compensation for no other property was claimed by Almota nor awarded by the Trial Court.

Exclusive of the leasehold improvements, etc., no dispute exists as to the valuation of the leasehold alone. The only controversy involves the valuation of the tenant owned improvements. Their ownership would continue for the full physical life of the property unrestricted by the term of the lease as Almota owns them without any time limitation. The crux of the question is their value at the end of the term. Almota contended and the Trial Court held that just compensation must include all elements affecting the fair market value including the probability or possibility that the lease would be renewed. The Government disagreed and contended that the value at the end of the term should be limited to salvage value.

The Circuit Court below, in agreeing with the Government, disregarded such cases as Olsen, supra, 292 U.S. 246, holding that all elements of value inhering in the property must be considered. The Court refused to follow the well established rule of the Second Circuit that fixtures taken should be valued at their fair market value for use in place (Allegheny Sand and Gravel, supra, 441 F.2d 356, and Manhattan cited by the Trial Court, 388 F.2d 596); it declined to place Almota in the same pecuniary position (Miller and Olsen, supra, 317 U.S. 369 and 292 U.S. 246); it refused to award the full amount of the fair market value for which Almota could have actually sold its interests (Miller, supra, and United States v. Petty Motor Company, 327 U.S. 372) or consider all reasonable probable uses including the probability of continued use in place (10,291 Acres of Land and 25.406 Acres of Land, supra, 411 F.2d 1081 and 172 F.2d 990); it declined to consider a valuable element not constituting in itself a legal property right (contrary to Jaramillo, supra, 190 F.2d 300, and its own holding in Fuller

supra, 442 F. 2d 504); and the unit rule, providing for the award to the tenant of the enhanced value to the fee arising from the tenant owned improvements, was ignored (Carlock, supra, 53 F. 2d 926; United States v. 2,979.72 Acres of Land, Etc., 235 F 2d 327; and Eagle Lake Improvement Co. v. United States, 160 F. 2d 182).

As a result the Court below awarded compensation of only $130,000 for property interests having an admitted fair market value of $274,625 if all elements whatsoever affecting the market value are considered. $130,000 cannot under any circumstances constitute just compensation for the same property which could have been sold in a fair market sale for $274,625. The result is a real shell game in which Almota now comes up with $130,000 where it formerly had property of a liquidation value on the market of $274,625. And it is told that the award is the equivalent of what it previously owned and further that the probability of the renewal of the lease was not compensable property and was too speculative for consideration even though valued by the market, at $144,625 ($274,625 less

$130,000). But Almota never claimed the ownership of the leasehold expectancy. The only claim was that it was an element adding value upon the market to the property Almota did own.

The Court below valued the tenant owned improvements as though the Government owned the fee at the time of the taking, which it did not, and thus could positively assure that the lease would not be extended at the end of the term. The Government had no legal right which could assure any such result. It should require no citation of authority whatsoever except the Fifth Amendment itself to conclude that the decision below is erroneous as $130,000 cannot possibly be just compensation for property which would sell for $274,625 in a fair market sale.

If constitutional rights are to mean anything, they must be protected and now. Unless a review is granted Almota will suffer a gross miscarriage of justice involving an unconstitutional taking of its property in the amount of $144,625. The decision below, if allowed to stand, will be cited in the future to deny other owners of leasehold improvements their just compensation. That can only be pre-

vented by the granting of this petition for review.

CONCLUSION

This Petition for Writ of Certiorari should be granted to settle both direct and inferential conflicts between the decision of the Court below and the decisions of other circuit courts and of the United States Supreme Court upon an important constitutional question of both present and future national significance, to uphold constitutional property rights, to prevent a gross miscarriage of justice, and to provide a rule of law to serve as a continuing guide in future numerous condemnation cases involving the taking of leasehold improvements.

Respectfully Submitted,

Lawrence Earl Hickman
Of Attorneys for Appellant
Almota Farmers Elevator and
Warehouse Company
E. 116 Spring Street
Colfax, Washington, 99111

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United STATES OF AMERICA, Appellant, vs.	)	FILED Sep 23 1971 Wm. B. Luck, Clerk
22.93 ACRES OF LAND, MORE OR LESS, SITUATE IN WHITMAN COUNTY, STATE OF WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, A WASHINGTON CORPORATION, Appellees.	)	No. 24,757

Appeal fron the United States District Court for the Eastern District of Washington Northern Division

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Before: MADDEN, Judge, United States Court of Claims,* KOELSCH and CHOY, Circuit Judges

MADDEN, J.

This is an appeal from a judgment rendered in the United States District Court in a condemnation action. This Court's jurisdiction of the appeal rests on Title 28 U.S. Code, 1291. The District Court rendered judgment for Almota Farmers Elevator and Warehouse Company, "Almota", in the

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* Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation.

amount of $274,625.00. The United States, the Condemnor, appeals, urging that the judgment should have been in the amount of $130,000.00. These divergent figures were contained in a stipulation entered into by the parties in the District Court proceeding, in which the parties agreed that if Almota's theory of the nature of its compensable interest in the property taken should be adopted by the Court, the just compensation for that interest would be $274,625.00, but if the Government's theory should be adopted, the just compensation would be only $130,000.00.

The condemnation action here under review was brought by the United States on behalf of its Department of the Army, to obtain all right, title and interest of Almota in certain land, which the Government took for the Little Goose Lock and Dam, a river improvement and navigational project on the Snake River below Lewiston, Idaho. The parcel of land in question consists of 0.75 of an acre, located in Whitman County, Washington. The fee title to the land was in the Oregon-Washington Railroad and Navigation Company, (Railroad). The condemnee, Almota had a lease from the Railroad on the 0.75 acre tract and had

built a 522,500 bushel grain elevator and a "flat house" also used for grain and other storage purposes, on the tract. On the date of the taking, May 26, 1967, a 20 year written lease was in force between the Railroad, as lessor, and Almota, as lessee. The expiration date of the lease was October 12, 1974, which meant that the lease had seven plus a fraction more years to run when the taking occurred on May 26, 1967. The lease contained no option giving the lessee a right of renewal of the lease.

Prior to the commencement of the condemnation action here under review, the United States had settled with the fee owner, the Railroad, for the Railroad's interest in the land here in question. We are not advised as to the terms of that settlement. Neither party to this case urges that those terms would be relevant in this case.

In the District Court the Government urged that Almota was entitled only to the fair market value of the use of the land and buildings for the seven year plus remainder of the term of its lease, less the agreed annual rent, plus the value of the buildings for removal or salvage purposes. The amount of the judgment, on this basis, was stipulated, as we have seen, to be $130,000.00.

Almota, in the District Court, urged that it was entitled to receive as just compensation the full fair market value of the use of the land and of the buildings in place as they stood at the time of the taking on May 26, 1967, without limitation of such use to the remainder of the term of the existing lease. As stated above, the parties stipulated that if Almota's contention should be adopted, Almota's judgment should be in the amount of $274,625.00. The District Court adopted Almota's argument and rendered judgment for it in the amount of $274,625.00. The United States then brought the instant appeal.

The Government's computation, limiting Almota's right of recovery to its legally protected interest for the remainder of the term of its written lease, differs so greatly from Almota's computation based upon fair market value, i.e. what a willing buyer would pay to a willing seller, because, in transactions in the market place, traders give weight to facts and circumstances in addition to those recognized and enforced by law. If, for example, a person, A, at about a year previous to the date of taking in this case, had funds available and a desire to acquire a going business, he might

have heard of Almota's grain elevator business. Investigation might have disclosed that it was a very profitable enterprise; that there was a large grain growing area which had become accustomed, over the years, to using Almota's elevator for storage and shipment; that the Railroad, the fee owner of the tract on which Almota's buildings were located was glad to have them there because most of the grain stored in the elevator would ultimately be shipped via the Railroad; that the Railroad, because of these circumstances, charged Almota only a nominal rent of $114.00 per year; that Almota had had, ever since 1919, an uninterrupted succession of leases on the land on which Almota's buildings stood.

A could well have concluded that if he bought Almota's current lease and buildings, so that he would be in possession of the land as the expiration of Almota's 20 year lease approached, and if he, A, was then operating the elevator business satisfactorily, the Railroad would, as it had always done for Almota, grant A a renewal of his lease, and would do the same in similar occasions in the future. Thus it might have seemed to A that the Almota elevator business was as permanent as the Railroad's business. If

a title lawyer warned A that all that A could, with legal certainty, acquire from Almota was the right to occupy the land and use the buildings for the then remaining eight years plus, of the term of the lease, A might well have said that he realized that, but was sure that Almota, in the circumstances, would not sell its lease at a price determined by the lawyer's standard, which price he had computed to be $130,000.00; that if he did not offer more than that he would lose the opportunity to acquire this promising business; and that, all things considered, he had decided to offer Almota $274,625.00 for its interest in the property.

If what we have surmised above had occurred, and A had acquired Almota's interest in the land, and a year later the Government had "taken" that interest from A, A's hope and expectation of carrying on, far into the future, the profitable grain elevator business, would have been completely frustrated. It would be said that he had speculated, and lost, unless he could compel the Government to reimburse him for his loss.

The question which we must answer in the instant case is "Does the word 'property' in the language of the Fifth Amendment of

the Constitution of the United States, '* * nor shall private property be taken for public use, without just compensation,' include hopes and expectations, even those so well grounded that they have a market value?" Lest it be thought that the answer to the question posed above is easy and obvious, we quote the language of the Supreme Court of the United States in Segal v. Rochelle, 382 U.S. 375, 379 (1966).

> [i]t is impossible to give any categorical definition to the word "property", nor can we attach to it in certain relations the limitations which would be attached to it in others.

In Segal, the court interpreted the word "property" as used in Bankruptcy Act, 11 U.S. Code §110(a)(5)" most generously," for the purpose of making available for creditors interests of the bankrupt, even if the enjoyment by him of those interests was to be postponed. In Lines v. Frederick, 400 U.S. 18 (1970), the Court held that $137.28 of "vacation pay" which had accrued but had not yet been paid to a workman, at the time he filed his petition in bankruptcy, was not "property", within the meaning of §70a (5) of the Bankruptcy Act, supra. In so holding, the Supreme Court affirmed this Court's decision in Frederick v. Lines, 425 F.2d 215. The Supreme Court in Lines, 400

U.S. at p. 19 said:

> The most important consideration limiting the breadth of the definition of "property" lies in the basic purpose of the Bankruptcy Act to give the debtor a "new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt * *. 1/

Whether the Supreme Court regards the word "property" as used in the Fifth Amendment as being as flexible as that Court has held it to be in Segal, supra, and Lines, supra, and, if it does regard it as flexible, what pressures of policy are exerting themselves in one direction or the other, are crucial questions in our instant case.

We return to the question whether the word "property" in the Fifth Amendment embraces hopes and expectations which have a market value?

In United States v. Petty Motor Co., 327 U.S. 372, (1946), the Court said, p.380, fn. 9:

> The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights.

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1. In our recent decision in In the Matter of E. V. Moore of California, Inc. Bankrupt, ___ F.2d ____, August 17, 1971, No. 24,493, we discussed the Segal case and the Lines case, both supra.

The Court, in Petty Motor, at p. 376, said that a tenant whose lease contained a "termination by condemnation" clause had no right of recovery when the property was condemned because the "tenant has no right which persists beyond the taking and can be entitled to nothing".

In United States v. Scully, 409 F.2d 1061 (CA 10, 1969), the evidence showed that Scully had extensive land holdings which holdings were leased on an annual basis to numerous tenants. The tenants had no legal right to renewal, but the custom had been to renew them each year. At the condemnation trial there was testimony that because of this custom of renewal, the Scully leases had a market value greater than the value of the one year term and the improvements owned by the tenants. The District Court awarded compensation based upon the tenants' theory. The Court of Appeals reversed, holding that the custom of renewal could not create legal interests extending beyond the express one year term granted by the leases. The Court relied upon Petty Motor Co., supra. It also quoted with approval language of Holmes, J. in Emery v. Boston Terminal Co., 178 Mass. (72, 59 N.E. 763 (1901), as follows:

> Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioner's holding, they could not be taken into account * *. They added nothing to the tenant's legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.

In Scully, the Supreme Court denied certiorari, 396 U.S. 876. Almota, in its brief says:

> The gist of the argument in the Government's brief appears to be the following statement appearing on pages 4 and 5.
>
> Only vested property rights are compensable. Lessee's mere renewal expectancy, not embodied in a lease, does not rise to the status of a vested property right.

Almota then goes on to say:

> However, the Company (Almota) at no time has claimed compensation for any renewal expectancy as such, nor did the Court (the District Court) make any award for it as a property right in itself. Two principal rights of ownership were claimed (1) ownership of a leasehold interest in the land and (2) ownership of building and machinery.

As to item (1), there is, of course no controversy. The right to occupy the land and use the structures on it for the seven plus years balance of the lease is not disputed and would be paid for by the $130,000.00 sum for which the Government contends. So

the balance of the $274,625.00 sum for which Almota contends hinges, somehow, upon the fact that there were valuable buildings and machinery upon the land. But, of course, the value to Almota of the right to use the buildings and machinery on the land after the expiration of the current lease would depend upon whether Almota would have a right to use the buildings and machinery upon the land, after the expiration of the lease. As far as we are aware, Almota's legal right in its buildings and machinery, after the expiration of the lease, would have been the right to remove them, or to sell them to the railroad or to a successor lessee at a price dictated completely by the purchaser. The disclaimer by Almota in its brief, and the failure to claim, in its pleadings, any compensation for any disappointed renewal expectancy is a by-passing of a route recognized by Almota to be treacherous and unsafe. It would confront the statement, obviously true, of Justice Holmes in Emery, that the "market value" of such an interest would "represent a speculation on a chance, not a legal interest". We find no merit in Almota's argument that, because there were buildings, the issue before us is different from what it would have been if there had been no buildings.

An important case in this Circuit is

Osborne v. United States, 145 F.2d 892, _____(CA 9, 1944) wherein are collected numerous cases involving claims arising out of disappointed expectations resulting from the revocation of various government permits which were legally revocable. Recovery was denied in all the cases.

If the law were to go into the business ofawarding compensation for an expectancy which never materialized, because the sovereign "took" the subject of the expectancy, should, in Scully, supra, e.g., the one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy? In our instant case, was the stipulation based upon some actuarial computation such as the prospective life of the buildings and machinery, or the life of the railroad, or upon free-ranging guesswork?

The District Court in our instant case relied heavily upon the important decision of the Court of Appeals for the Second Circuit, United States v. Certain Property, Borough of Manhattan, 388 F.2d 596 (1968. The opinion in that case does support the contentions of Almota in the instant case. It awards compensation for expectations disappointed by the exercise of the sover-

eign power of eminent domain, expectations not based upon any legally protected right, but based only, to borrow the language of Justice Holmes in Emery, supra, upon "a speculation on a chance". In the Borough of Manhattan case, supra, the Court says " * * an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, * *". Almota urges that the alchomy performed by the Court in Borough of Manhattan, the conversion of items, which would have weight in the thinking of a speculator, into Fifth Amendment "property" and thence into dollars, is an introduction of modern realism into the law, to displace dry and tired conceptualism.

We are not persuaded by the Borough of Manhattan, supra, opinion. We are not aware of any policy such as those which influenced the Supreme Court in the Segal case, supra, and the Lines case, supra, to give certain interpretations to the word property in the Bankruptcy Act, which has a bearing on the meaning of "property" in the Fifth Amendment. The coventional meaning given to the word in Petty Motor Co., supra, and in the ana-

logous situations cited by our court in Osborne v. United States, supra, constitute a body of precedent and tradition on the subject which we think is right. We conclude that the judgment of the District Court is erroneous. We reverse the judgment and remand the case to the District Court with a direction to enter a judgment in favor of the condemnee, Almota Farmers Elevator and Warehouse Company for $130,000.00, each party to bear its own costs.

FILED
Dec 9 1971
Wm. B. Luck,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. 22.95 ACRES OF LAND, MORE OR LESS, SITUATE IN WHITMAN COUNTY, STATE OF WASHINGTON: ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, A WASHINGTON CORPORATION, Appellees.	No.24757

Before: MADDEN, Judge, UNITED STATES COURT of CLAIMS, KOELSCH and CHOY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to recommend against the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

M. Oliver Koetsch
United States Circuit Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 22.95 ACRES OF LAND, WHITMAN COUNTY, WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al, Defendants.	No. 3021

RECORD OF PROCEEDINGS ON MOTIONS

BE IT REMEMBERED:

THAT the hearing on motions for the above-entitled action came on for determination on November 4, 1968, before the Honorable Charles L. Powell, Judge, in the District Court of the United States, for the Eastern District of Washington, Northern Division, Spokane, Washington, the plaintiff appearing by Mr. Robert M. Sweeney and Mr. John H. McRae, Assistant U.S. Attorneys, the defendant appearing by Mr. Lawrence Hickman;

WHEREUPON, the following proceedings were had:

* * * * * * *

"THE COURT: The body of the motion says: 'Defendant landowner moves for an order determining that in the above entitled case the defendant Almota Farmers Elevator and Warehouse Company Incorporated be entitled to be compensated for the full market value of its leasehold and its building improvements thereon as a

unit as of the date of taking, including both of the following (1) market value of the leasehold exclusive of building improvements being the difference between the value of the use and occupancy of the leasehold for the remainder of the term, less the agreed rent to be paid; (2) plus the market value of the building improvements in place on the leased premises for use thereon, without being limited to the value of their use for the remainder of the term.'

Now, as I understand it, there are some limitations, self imposed limitations on the valuation as the landowner would have the valuation witnesses take into consideration the fact that the lease by its terms does expire in 1974. It has always been renewed, and had a history of renewal, and that bothers Mr. Hickman and is one of the things as to which Mr. Hickman and Mr. McRae do not agree.

It is my understanding that in order to put the Almota Farmers Elevator and Warehouse Company in the same position pecuniarily as it was in before the taking, it would be necessary to apply the unit rule, that the property taken is to be valued as of the date of taking. That means that the Almota Company would be entitled to have the property valued as it then was including their lease and including the prospect of renewal, and including the value of the property with the improvements as it then was.

Under the facts in this case it would be necessary to have the appraisers appraise the property as it then existed, deducting therefrom the value of the land itself, the value that goes to the railroad company, and then limit their valuation by

by reason of the possible prospects of renewal, or possible loss of value suffered by virtue of requirements of the landlord that the buildings be removed at the end of the lease.

Now, I believe in giving credit where credit is due, and my law clerk just came up with a case in 388 F(2), decided in 1968, 388 F(2), 596, United States v certain property, Borough of Manhattan; and it is a Second Circuit case, heard in banc on rehearing. All nine judges of the Second Circuit sat, Judge Friendly wrote the opinion. It doesn't pass on whether property is real or personal, but it does pass on the question of what would be taken into consideration in connection with the renewal of a short term lease, and I read this because it does have a bearing on valuations that may be arrived at in this case.

> 'We are unable to follow the panel majority in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their property leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, thus even when the lease has expired condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant - - the only two

people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience that the fixtures would be removed at the expiration of the stated term.'

So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking.

I am granting Mr. Hickman's motion, in other words."

* * * * * * * * * *

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	
22.95 ACRES OF LAND, WHITMAN COUNTY, WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al, Defendants.	)	No. 3021

RECORD OF PROCEEDINGS AT THE TRIAL

BE IT REMEMBERED:

THAT the above-entitled action came regularly on for trial and determination on March 21, 1969, before the Honorable Charles L. Powell, Judge, without a jury, in the District Court of the United States, for the Eastern District of Washington, Northern Division, Spokane, Washington, the plaintiff appearing by Mr. Robert M. Sweeney and Mr. John H. McRae, Assistant U.S. Attorneys; the defendant appearing by Mr. Lawrence Hickman;

WHEREUPON, the following proceedings were had:

* * * * * * * * * * * * *

THE COURT: All right.

Well, gentlemen, consistency is a rare jewel, but I hope to be consistent in this case.

On November 21, 1968, I signed the order granting defendant's motion for determination of loss, which has been copied in principal part, into Paragraph 10 of the present stipulation filed today, and which has been received in evidence.

That ruling, generally, is carried into the pretrial order, which was signed on March 6, 1969, and I propose to adhere to that ruling, and I will state again the reasons for which I do so, and it is that I feel that if I do not recognize the current practice of treatment of these leases as having a more than ordinary probability of renewal, that I would be depriving the defendant landowners of an essential and substantial element of value which they would have if they offered their property, not on the condemnation, but on the open market.

Therefore, I will deny the government's motion to strike Paragraphs 9, 10, and 13; and overrule their objection to my consideration of Paragraphs 7; and grant judgment for the defendant Almota Farmers Elevator and Warehouse Company in the amount of $274,625.00 in accordance with the stipulation.

APPENDIX B

FILED IN THE U. S.
DISTRICT COURT
Eastern District of
Washington
Mar 21 1969
Dorothy E. Moulton,
Clerk
L. R. Deputy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 22.95 ACRES OF LAND, etc.; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al., Defendants. ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a corporation, Stipulating Defendant.	CIVIL NO. 3021 STIPULATION AS TO PARCEL "A"

COMES NOW the plaintiff United States of America, by and through John H. McRae, Assistant United States Attorney, and the defendant Almota Farmers Elevator and Warehouse Company, a corporation, by Lawrence Hickman, Attorney at Law, and in connection with Parcel "A" of the above-captioned proceeding stipulate and agree to the following facts and procedures:

1. This is a civil action commenced by the plaintiff United States of America to acquire title to a certain interest in land designated in this proceeding as Parcel "A", which interest was required for public use by the United States in

connection with the construction of the Little Goose Lock & Dam Project of the Corps of Army Engineers on the Snake River in Whitman County, Washington.

2. Parcel "A" is a parcel of land containing 0.75 of an acre lying within the existing right-of-way of the Oregon-Washington Railroad and Navigation Company in Whitman County, Washington, and said land is more particularly described in Exhibit No. 1 attached to this Stipulation and by this reference made a part hereof.

3. The estate acquired in this proceeding to Parcel "A" is all right, title and interest of the defendant Almota Farmers Elevator and Warehouse Company in and to the land described on attached Exhibit No. 1, subject, however, to existing easements for public roads and highway, public utilities, railroads and pipelines, if any.

4. On May 26, 1967, the United States of America filed a Declaration of Taking in this proceeding and deposited the sum of $108,500.00 as estimated just compensation as to Parcel "A", and thereupon the estate set forth in Paragraph 3 of this stipulation vested in the United States of America. It is agreed that May 26, 1967 is the date of taking in this proceeding as to Parcel "A".

5. On may 26, 1967, the date of taking herein, the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land designated as Parcel "A" was a leasehold interest in said land and the structures and improvements situated thereon, as said interest is set forth in that certain agreement dated March

2, 1955 by and between the Oregon-Washington Railroad and Navigation Company as lessor and the defendant Almota Farmers Elevator and Warehouse Company as lessee. Copies of said leasehold agreement, with amendments, supplements and modifications thereto, are attached to this Stipulation as Exhibit No. 2, and it is hereby agreed that such copies may be admitted in evidence for all pertinent purposes, including the purpose of setting forth the leasehold rights of the defendant Almota Farmers Elevator and Warehouse Company in and to the land designated as Parcel "A".

6. The interest of the defendant Almota Farmers Elevator and Warehouse Company in the land described as Parcel "A" and to the improvements situated thereon is the interest set forth in that certain lease by and between defendant, as lessee, and the Oregon-Washington Railroad and Navigation Company, as lessor, copy of which is identified as plaintiff's Exhibit No. 2 and which provides in pertinent part as follows:

a. The lease term is a period of twenty years commencing October 13, 1954, and expiring October 12, 1974;

b. The property is leased for the purpose of receipt, shipping, storage and handling of grain;

c. The lessee may remove its buildings and improvements at the expiration of the lease, but if the lessee does not do so, they are to become the property of the lessor, who may remove them at lessee's expense.

d. The lease contains no option for renewal.

7. It is stipulated and agreed that there is evidence available to the effect that as of May 26, 1967, the date of taking herein, and for some years prior thereto, the railroad company, as the owner of the fee simple title to lands subject to leasehold interest for grain elevators, was extending the terms of existing leaseholds or granting new leaseholds to former lessees upon the expiration of existing terms on the same or similar terms as the expired leaseholds, that it was generally accepted by lessees of the railroad that such renewals of the leasehold interest could be expected, and that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad. It is further stipulated and agreed that there is evidence available to the effect that buyers of leasehold interests in railroad land were paying more for the unexpired term of the leasehold interest sold than the value of the bare legal rights possessed by the lessees under such leasehold agreements.

8. The plaintiff United States of America has contended that any evidence relating to the custom or practice in the community or the policy or practice of the parties relating to the extension of this or similar leases is not pertinent, material or competent, and that the just compensation to be paid for the taking of the defendant's leasehold ingerest, including building improvements, in Parcel "A" should be based upon the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking, and that no consideration

should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable rental.

9. The defendant Almota Farmers Elevator and Warehouse Company has contended that the just compensation to be paid for the taking of its leasehold interest in Parcel "A" should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market as of the date of taking, with consideration being given to the probability or possibility that the leasehold interest would be extended beyond the termination date set forth in the lease agreement, as it may affect market value.

10. The Court has made the following ruling at pretrial: ". . . the defendant, Almota Farmers Elevator and Warehouse Company, Incorporated, is held to be entitled to be compensated for the full market value of its leasehold "and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal."

11. It is further stipulated and agreed

by and between the parties hereto that the buildings, structures and improvements, including installed grain handling equipment and machinery, comprising a part of the realty are no longer required by the plaintiff and that the right to remove said buildings, structures and improvements, including installed grain handling equipment and machinery, may be and hereby is excluded from the proceeding, and right to remove the improvements as aforesaid will be revested in the former owner, PROVIDED that the removal of such buildings, structures and improvements, including installed grain handling equipment and machinery be effectuated by the defendant on or before September 30, 1969, and PROVIDED FURTHER that in the event such equipment, machinery and improvements are not removed by the defendant on or before September 30, 1969, or such further date as may be agreed upon by the plaintiff and defendant, then the right of removal shall terminate automatically, and the United States of America shall have a good and indefeasible title to such equipment, machinery and improvements as remain without notice to the defendant.

12. It is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN, in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate con-

demned is the sum of $130,000.00, together with interest as hereinafter provided.

13. On the other hand, it is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant, as set forth in Paragraphs 9 and 10 of this stipulation, THEN in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate condemned is the sum of $274,625.00, together with interest as hereinafter provided.

14. It is stipulated and agreed by and between the parties hereto that the following procedure may be utilized, subject to the approval of the Court, in the trial of this case and in the entry of judgment:

a. The case may proceed to trial before the Court sitting without a jury on the basis of the facts herein stipulated and upon the basis of the admitted facts as set forth in the Pre-Trial Order entered herein on March 6, 1969, namely, Paragraphs 1 through 12 of the Admitted Facts as set forth on pages 2, 3, and 4 of said Order, and on lines 1 through 12 of page 5 of said Order.

b. Neither party admits to the relevancy, materiality or competency of any or all of such facts, although the

truth of such facts may be admitted as hereinabove stipulated.

c. If the Court should determine at said trial that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the amount of $130,000.00, and it is further stipulated and agreed that in such event the Court should provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of such judgment.

d. On the other hand, if the Court should determine at said trial that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant as set forth in Paragraphs 9 and 10 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the sum of $274,625.00, and it is further stipulated and agreed that in such event the Court should

provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of judgment.

e. The parties hereto reserve all exceptions to the Court's rulings and all rights to an appeal from the judgment of the Court, and in the event of reversal or remand, the terms of this stipulation shall be applicable as herein set forth, including the amount of just compensation payable by the United States of America to the defendant Almota Farmers Elevator and Warehouse Company, and such terms shall prevail in the re-trial of this action or such other further hearings as the Appellate Court may require in accordance with the mandate of such Court.

15. It is further stipulated and agreed by and between the parties hereto that at the time judgment determining just compensation in this proceeding as to Parcel "A" is entered pursuant to this stipulation, whether such judgment be in the amount of $130,000.00 or in the amount of $274,625.00 as hereinbefore provided, then in either event, the plaintiff and the defendant shall file a stipulation that the terms of that certain order entered August 14, 1968, Amending Order of Possession as to Parcel "A", shall be amended so as to provide that the defendant may retain possession of the premises designated as

Parcel "A" for the period March 1, 1969 to September 1, 1969 without the requirement of the payment of rent for such occupancy to the plaintiff, and further providing that the possession of the defendant of said premises be extended to the date of September 30, 1969, also without the payment of rent, and further providing that in the event construction schedules permit and it is agreed by officials of the Corps of Army Engineers that the possession of the defendant of the premises may be extended to November 1, 1969, then in such event that the further extension of possession to November 1, 1969 shall also be without the requirement of the payment of rent on the part of the defendant.

DATED this 20 day of March, 1969.

John H. McRae

John H. McRae
Assistant United States Attorney

Lawrence Hickman

Lawrence Hickman
Of Attorneys for Defendant
Almota Farmers Elevator & Warehouse Co.